United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-5024

United States Court of Appeals

B

FOR THE SECOND CIRCUIT

Docket No. 75-5024

P/S

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & Co., a Limited Partnership, Bankrupt,

Plaintiff-Appellant,

—against—

NEW YORK PRODUCE EXCHANGE *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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Preliminary Statement

Plaintiff-Appellant, the Trustee in Bankruptcy of Ira Haupt & Co. ("Trustee"), submits this brief in reply to the joint brief and the four supplemental briefs submitted herein by defendants-appellees.*

In his main brief, the Trustee marshalled the evidence from which a jury could reasonably have found that defendants failed properly to discharge their regulatory responsibilities, that their acts and failures to act were motivated by self-interest, and were taken in bad faith and in a fundamentally unfair manner (App. Br., pp. 9-44). The Trustee also set forth the details concerning the various errors of the Trial Court, including: (1) improper limitation of the Trustee's proof; (2) refusal to allow the jury to pass upon the seminal issue of defendants' motivation and intent; (3) the erroneous admission of an untrustworthy and highly prejudicial report; and (4) incorrect jury instructions (App. Br., pp. 44-99).

* Defendants have submitted a main brief on behalf of all defendants ("Joint Br.") and four separate briefs: (1) on behalf of the Produce Exchange, MacDonald, Fashena and Usiskin ("Produce Exch. Br."); (2) on behalf of Klein and Bunge ("Bunge Br."); (3) on behalf of Vogel and Continental ("Continental Br."); and (4) on behalf of Anderson and Merrill Lynch ("Merrill Lynch Br.").

Defendants would have this Court ignore the substantial evidence introduced by the Trustee and dismiss as irrelevant the prejudicial errors of the Trial Court. Placing principal reliance upon the allegedly disabling nature of Haupt's conduct, defendants ask this Court to accept their contentions as undisputed fact and conclude, as a matter of law that: (1) a jury could not have found that defendants improperly regulated the market, and (2) a jury presented with the question would necessarily have found that Haupt's conduct was worse than that of defendants. Defendants' suggestion that this Court usurp the jury's function must be rejected. It is for the jury alone on a proper record to weigh the evidence and resolve the disputed issues of fact.*

POINT I

HAUPT'S ALLEGED MISCONDUCT CAN IN NO EVENT ENTITLE DEFENDANTS TO JUDGMENT AS A MATTER OF LAW.

Defendants erroneously assume that the Trustee is chargeable with Haupt's conduct. Contrary to defendants' assertions (Joint Br., p. 4), Haupt is *not* the plaintiff

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* The Produce Exchange filed a notice of cross-appeal on January 2, 1976 (R. 308), from an order entered December 4, 1975 (R. 306), which, *inter alia,* dismissed the counterclaim which the Exchange interposed against the Trustee. However, since this order did not determine the rights of all the parties, it was not a final order, *see Coulter* v. *Sears Roebuck & Co.,* 411 F.2d 1189 (5th Cir. 1969), and the cross-appeal therefrom is jurisdictionally defective. *See* 28 U.S.C. § 1291; Federal Rules of Appellate Procedure, Rule 4; *Vine* v. *Beneficial Finance Co.,* 374 F.2d 627 (2d Cir. 1967); *cert. denied,* 389 U.S. 970 (1967).

On January 30, 1976, a final judgment was entered (JA 2140a). From this judgment, the Trustee appealed on February 2, 1976 (JA 2143a). No cross-appeal was taken by the Produce Exchange.

Apparently choosing to abandon its cross-appeal, either because it is unperfected or without merit, the Produce Exchange omits any mention of it in either its separate brief or in defendants' Joint Brief and seeks only an affirmance of the judgment below.

in this case. The plaintiff is the Trustee and he is suing on behalf of Haupt's creditors, the real parties in interest herein. It is the creditors of Haupt—innocent third parties who mistakenly relied upon the *bona fides* of the defendants and the market which they purported to regulate—who were most damaged by the defendants' misconduct and who seek compensation from the defendants. This is not, as defendants contend, a case of the "criminal" suing the "policemen," as the defendants call themselves (Joint Br., p. 52); this is a case where the policemen themselves are the criminals.

As a direct result of defendants' illegal conduct, Haupt lost $12,000,000, and when Haupt and its partners went bankrupt, Haupt's creditors were left holding the bag. Only the "policemen" profited from this debacle. But in any event, a bankrupt's alleged misconduct is not a bar to suit by a trustee or a receiver against an exchange based upon the latter's failure to carry out its regulatory duties. *Collins* v. *PBW Stock Exchange, Inc.,* 408 F. Supp. 1344 (E.D. Pa. 1976); *Lank* v. *New York Stock Exchange,* 405 F. Supp. 1031 (S.D.N.Y. 1975); *cf. Pettit* v. *American Stock Exchange,* 217 F. Supp. 21 (S.D.N.Y. 1963).

In *Lank,* the receiver of a defunct securities brokerage firm brought suit against the New York Stock Exchange based upon its alleged failure to enforce compliance with the securities laws and its own rules. The Stock Exchange contended that the officers and employees of the firm had deliberately wasted its assets and, in language remarkably similar to that employed by the defendants herein, argued that to allow the receiver to bring suit would be "tantamount to permitting the robber to sue the policeman for not catching him before he had a chance to rob." 405 F. Supp. at 1036. This argument was rejected by the district court which held that public policy forbade the Exchange from raising such a defense and further that the firm's creditors, unlike the Exchange and the firm itself, were in no way

responsible for the losses they incurred. 405 F. Supp. at 1036-39.*

Collins differs from *Lank* only in that the *Collins* plaintiff was a trustee in bankruptcy, not a receiver. Despite the assertion of the *Collins* defendants that "the *Lank* opinion offers neither logic nor authority [and] shows no awareness of the problem," 408 F. Supp. at 1350, n. 2, the *Collins* court found it to be logical, soundly based in precedent, and quite enlightened.

Defendants' argument that Haupt's employee—Stevens—had apparent authority to act and that they were entitled to rely upon his conduct (Joint Br., p. 74) completely misses the point. This is not a case where Haupt is seeking to disavow a contract signed by Stevens; rather, it is a case where defendants seek to impute the conduct of this faithless employee to the Trustee in an effort to bar suit against those charged with regulating in the public interest. *Lank, Collins* and *Sloan* make clear that Stevens' conduct is not relevant to this action.

A. *Even Assuming That Haupt's Conduct is Attributable To The Trustee, His Suit is not Barred, as a Matter of Law, by the Defense of* **In Pari Delicto** *or "Usual Principles of Tort Law"*

The Produce Exchange had an overriding statutory duty to maintain an orderly market, which the trader-regulators

* The case upon which defendants principally rely to support their contention that the Trustee is chargeable with Haupt's alleged misconduct, *New York Stock Exchange, Inc.* v. *Sloan*, 394 F. Supp. 1303 (S.D.N.Y. 1975), was decided by the same judge who decided *Lank*. In *Sloan,* the Stock Exchange sued the general and limited partners of a member firm and certain of its subordinated lenders to recover monies expended by the Exchange in compensating the firm's public customers for loss on their investments when the firm was liquidated. The defendants counterclaimed, alleging that the Stock Exchange failed to enforce compliance with the securities laws and its own rules. The Exchange moved to dismiss the counterclaims, which motion, as defendants herein note (Joint Br., p. 57), was granted by the court with respect to the general partners and *denied* with respect to the limited partners and subordinated lenders. *Sloan* supports the Trustee's position and not that of the defendants since the Trustee is representing Haupt's creditors, not its general partners. *See* 405 F. Supp. at 1036-37.

willfully ignored in their own self-interest (App. Br., pp. 84-86). Now, called to task for their conduct, defendants attempt to escape liability by nakedly asserting that the Trustee has conceded that Haupt's alleged culpability exceeds their own (Joint Br., p. 52), and that the Trustee's claims are therefore barred by "usual principles of tort law" or the doctrine of *in pari delicto* (Joint Br., pp. 52-59). Defendants' assertions are incorrect.

Common law defenses, such as *in pari delicto,* simply are not applicable to the Trustee's antitrust claim. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), and the cases cited in App. Br., p. 86.* Nor, in circumstances such as here present, will such defenses be allowed in a suit under the Commodity Exchange Act ("Act"). *See Woolf* v. *S. D. Cohn & Co.*, 515 F.2d 591 (5th Cir. 1975), *rehearing denied,* 521 F.2d 225 (1975); *Collins* v. *PBW Stock Exchange, Inc., supra; Lank* v. *New York Stock Exchange, supra;* App. Br., pp. 84-86. The securities cases cited by defendants do not support their contention that the Trustee's claims are barred under the Act (Joint Br., pp. 52-59). Unlike the Trustee's case, none of the cases cited by defendants involved a party charged with a statutory duty to regulate an exchange

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* In *Perma Life,* the Supreme Court stated:

> There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble damage actions, and the facts of this case suggest no basis for applying such doctrine even if it did exist. . . . We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. . . . The purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. . . .
>
> We therefore hold that the doctrine of *in pari delicto,* with its complex scope, content and effects, is not to be recognized as a defense to an antitrust action. 392 U.S. at 139-40.

Accord, Calnetics Corp. v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976).

where such common law defenses must yield to an overriding policy to foster self-regulatory responsibility (App. Br., pp. 85-86).*

In *Woolf* v. *S. D. Cohn & Co., supra,* the Fifth Circuit stated:

> [B]ecause of the two-fold purpose of the implied private rights of action that have grown up around the securities acts, deterrence of violations and compensation of those who have suffered pecuniary loss attributable to violations, the degree to which the defendant's unlawful activity affects the investing public must be given substantial weight in determining whether to permit interposition of the *in pari delicto* defense. Thus, even in a case where the fault of the plaintiff and defendant were relatively equal, simultaneous and mutual, the court might still reject the defense if it appeared that the defendant's unlawful activities were of a sort likely to have a substantial impact on the investing public, and the primary legal responsibility for and ability to control that impact is with the defendant. *Id.* at 604.

If anything, the need to foster responsible self-regulation is even stronger in the commodities area. *See, e.g., Lank* v. *New York Stock Exchange, supra* at 1038; *New York Stock Exchange, Inc.* v. *Sloan, supra* at 1315 ("The Commodity Exchange Act contemplates a far more active role for the

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* Completely inapposite are those cases cited by defendants which involve an *in pari delicto* defense based upon the affirmative, willful participation by the plaintiff in the violation engaged in by the defendant: *Securities & Exchange Comm'n* v. *Packer, Wilbur & Co.,* 498 F.2d 978 (2d Cir. 1974); *Serzysko* v. *Chase Manhattan Bank,* 290 F. Supp. 74 (S.D.N.Y. 1968), *aff'd,* 409 F.2d 1360 (2d Cir. 1969), *cert. denied,* 396 U.S. 904 (1969); *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath,* 378 F. Supp. 112 (S.D.N.Y. 1974); *Moscarelli* v. *Stamm,* 288 F. Supp. 453 (E.D.N.Y. 1968). Similarly irrelevant is defendants' citation to *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), which dealt with indemnification in the context of an underwriter/issuer relationship in a Rule 10(b)(5) case—a situation markedly different from the instant case which involves a regulator/regulatee relationship.

exchange in the everyday operation of the market than does the Securities Exchange Act"); *see also* H.R. Rep. No. 421, 74th Cong., 1st Sess. (1935); *cf.* S. Rep. No. 93-1131, 1974 U.S. Code Cong. & Admin. News 5843, 5855.

The Trustee contended and introduced evidence at trial which proved that Haupt's conduct—to the extent relevant in this suit by the Trustee—paled before defendants' more egregious conduct. Assuming *arguendo* the applicability of *in pari delicto* or, as defendants seem to be groping for, a standard of comparative negligence, at a minimum it is for the jury to determine the relative fault of the parties. *See, e.g., Bernstein* v. *Universal Pictures, Inc.,* 517 F.2d 976, 982 (2d Cir. 1975); *Moscarelli* v. *Stamm,* 288 F. Supp. 453, 460 (E.D.N.Y. 1968). In taking away from the jury the issue of defendants' motivation, in making erroneous evidentiary rulings and in giving incorrect instructions, the Trial Court deprived the jury of an opportunity to determine the relative fault of the parties. For this reason, the Trustee is entitled to a new trial.

B. *Defendants' Failure To Regulate Was The Cause Of Haupt's Losses At Issue Herein*

The evidence introduced by the Trustee demonstrated that Allied's manipulation was in full swing by the Spring of 1963, that positions had become overly concentrated by July 1963, that the market was already in a disorderly condition prior to August 1963, and that defendants were aware of these conditions (App. Br., pp. 17-22). When in late August, Haupt, inexperienced in the market, began to clear more than a handful of contracts for Allied (Def. Ex. 214), it unwittingly took over a position which defendants had permitted to exist and which proved to be a loaded bomb. Had defendants taken effective action to curb Allied's improper market activities, Haupt would not have lost one penny.* Instead, defendants abused their position

* Prior to August 8, 1963, Haupt never carried more than a total of 42 cottonseed oil futures contracts for Allied (Def. Ex. 214). It was not until September 5 that Haupt began to carry a substantial position as broker for Allied on the Produce Exchange (JA 1774.1a-75a).

of trust, DeAngelis continued his activities and Haupt lost $12,000,000.

Defendants seek to avoid the consequences of their regulatory failures by taking refuge in alleged misconduct by Haupt. The facts do not support their contentions.

When Haupt first began to deal with Allied, it did so only after checking with others and pursuant to a written agreement drafted by counsel for the Clearing Association (Def. Ex. 15). When it later began to act as a broker for Allied, Haupt was the only such broker to obtain a hedge letter from DeAngelis (JA 1057.1a-58a). Its employees made a number of inquiries to the Produce Exchange concerning the handling of the Allied account, and never once did the Exchange suggest that Haupt follow an alternate course of action. Haupt's participation in ex-pit transactions simply followed the example set by Merrill Lynch, Bunge and Continental, among others.*

Defendants object to the Trustee's characterization that the Exchange gave Haupt the green light to deal with DeAngelis (Joint Br., p. 35 fn.). Nevertheless, such are the facts. When Haupt was asked to take over a large position for Allied in September, Barton of Haupt called Berg to appraise him of the transaction (JA 1875a-76a, 1908a-09a). He told Berg that the transaction would raise the possibility of a squeeze by Allied and that he would therefore ask DeAngelis for written assurance that he did not intend to stand for delivery on such contracts (JA 1905a-06a). Berg simply responded "[t]hat is fine" (JA 1906a), and the transaction was consummated. Barton also contacted Berg when, on September 26th, DeAngelis decided to liquidate 2,454 contracts in a Type 6-B ex-pit transaction (JA 1877a-80a). Berg told Barton what documentation was required and Barton followed Berg's directions in completing the transaction (JA 1880a, 1908a-10a).

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* Barton had never participated in a type 6-B ex-pit transaction until September 1963 (JA 1908a-09a). By the time Haupt first participated as broker for Allied in a 6-B ex-pit, Merrill Lynch had already engaged in 20-25 such 6-B ex-pit transactions during 1963 (JA 1776a-77a; *compare* Pl. Ex. 142 *with* Def. Ex. 213).

While in the hospital, Barton noticed that Stevens had allowed the Allied account to continue to build (JA 1886a). He called Berg and told him that he wanted to obtain some short positions to reduce Haupt's net long position for clearing purposes, and asked for advice. Berg encouraged Barton to go ahead (JA 1886a-87a, 1910a-11a). Haupt did so and obtained 2,510 short contracts from Ralph Peters & Co. (Pl. Ex. 136), which Peters later removed from Haupt on November 18th, thereby increasing Haupt's net long position at the Clearing Association. Defendants claim this transaction shows that Haupt negligently permitted its net long position to increase on that date (Joint Br., p. 22). But the facts are clear: Haupt had no choice. Its customer, Ralph Peters & Co., had every right to withdraw its short position at any tme (JA 1899a), and did so on November 18. Having concurred in Haupt's decision to engage in such a transaction, defendants can hardly cite this transaction as proof of Haupt's culpability.

Defendants seek to obfuscate the fact that their regulatory failures led directly to Haupt's loss of $12 million in variation margin payments by urging that Haupt's losses were caused by its "heedless over-extension of credit to Allied" (Joint Br., p. 66). They claim that (1) Haupt lost $34 million in the Salad Oil debacle (Joint Br., p. 18); (2) Haupt went bankrupt largely because of fraudulent warehouse receipts issued by DeAngelis (Joint Br., p. 67); and (3) that this suit was brought to recover the losses incurred by Haupt by reason of these fraudulent warehouse receipts (Joint Br., p. 55).

While Haupt did lose substantial sums in connection with its financing arrangements with Allied, and went bankrupt in part because the warehouse receipts which it held as collateral for these loans proved to be fraudulent (JA 1900a-02.1a), the Trustee is not suing to recover therefor. This lawsuit has been brought *solely* to recover the $12,000,000 in variation margin which Haupt, pursuant to the Exchange rules (Pl. Ex. 56, Rule 25, incorporating by

reference Pl. Ex. 59, Sec. 23), was required to pay on behalf of its customer, Allied, when the price of cottonseed oil futures collapsed during the period November 14-20. These payments had nothing to do with financing arrangements or fraudulent warehouse receipts, and this is not a suit for having caused Haupt's bankruptcy. As the District Court recognized in denying defendants' motion for summary judgment, even if Haupt had remained solvent following the debacle, this lawsuit could have been brought. *Seligson v. New York Produce Exchange,* 378 F. Supp. 1076, 1085 (S.D.N.Y. 1974).*

Similarly misleading is defendants' suggestion that the $10 million in variation margin which Haupt received during the period September 1 to November 13, 1963 should somehow offset Haupt's losses during the period November 14-19 (Joint Br., pp. 12-13). During the same September 1 to November 13 period, Haupt *paid* to the Clearing Association approximately $7 million in variation margin in behalf of Allied (Pl. Ex. 267). This $3 million difference between variation margin payments and receipts was properly turned over by Haupt to its customer—Allied (JA 1864a-65.1a). By contrast, the $12 million at issue in this suit was paid to the Clearing Association by Haupt without any reimbursement from Allied.**

* Defendants seek to gain some mileage from the $3 million which was refunded *by the Clearing Association* to Haupt after the contracts were settled. This sum was what remained of the original margin which Haupt had posted on Allied contracts it was clearing as of November 14. Pl. Ex. 158 shows that, when the market collapsed, most of Haupt's original margin was transferred to the Haupt variation margin account. Thereafter, these amounts were disbursed to the clearing members holding short positions. Altogether, Haupt made payments to the Clearing Association during the November 14-19 period totalling $15 million, and it received back $3 million. The net loss remains $12 million—the sum which the Trustee seeks to recover in this case.

** Another "red herring" raised by defendants is their claim that Haupt was at fault for accepting "product margin" in the form of field warehouse receipts from Allied. While it is true that some of these field warehouse receipts later proved to be forged (Joint Br., p. 18), the losses which Haupt sustained because it accepted

Nor can defendants find solace in Haupt's alleged inaction during the November 14-19 period (Joint Br. pp. 21-24). By November 14th, Allied held 90% of the outstanding long position, the bulk of which was being cleared by Haupt (Pl. Ex. 1; Def. Ex. 214). The short position was concentrated in a handful of large companies which were sitting by and waiting for prices to fall (Pl. Ex. 1). As Barton testified, it was too late for Haupt, on its own, to take any meaningful steps to prevent injury (*see* JA 1888a).* The unbalanced and disorderly market situation which defendants were charged with preventing has already occurred, and there was nothing Haupt could have done to prevent prices from falling.

Haupt's unfortunate situation, of course, was well known to defendant trader-regulators. They knew on November 14th that Allied held an unprecedented 90% of the outstanding long position, most of which was held by Haupt (Pl. Ex. 1; App. Br., pp. 36-37). They further knew that the Clearing Association scale-up margin, which was to take effect the very next day, would require Haupt to expend substantial monies on behalf of its customer, Allied. And finally they knew that the market could not sustain itself without Allied's support, and that Allied could not support the market forever.

In the face of all this, defendants breached their trust and let the market continue to fall while they profited and Haupt lost (App. Br., pp. 35-44). When Haupt had no more money to lose, and further losses would have to be

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forged warehouse receipts are not at issue herein. Moreover, under the rules of the Produce Exchange, since Haupt had obtained a hedge letter from DeAngelis (Pl. Ex. 251), it was not required to obtain any original margin at all on the contracts it held for Allied (Pl. Ex. 56, Rule 31). Rather than being reckless in accepting "product" as part of the original margin deposits received from Allied, Haupt was being more cautious than required by the rules of the Produce Exchange itself (JA 1903a).

* Indeed, when at Haupt's request defendant Anderson finally canvassed the trade to see if a voluntary transfer of the Allied contracts was feasible, there were, not surprisingly, no takers (JA 1228a-34a; App. Br., p. 39 fn.).

borne by defendants, they closed the market and arbitrarily fixed a settlement price that favored the shorts at the expense of Haupt (App. Br., pp. 42-43). Surely it would not be difficult for a jury to conclude that the actions of defendants, not Haupt, during the period November 14-19, caused Haupt's losses.*

POINT II

THE TRUSTEE PROVED A *PRIMA FACIE* CASE UNDER THE COMMODITY EXCHANGE ACT AND THE ANTITRUST LAWS.

Defendants' fallback position is that nothing was wrong with the market during 1963 (Joint Br., p. 28 fn.), that if anything was wrong they did not and could not detect it (Joint Br., pp. 10, 25-27), that if they did know about it they made a proper investigation (Joint Br., pp. 33-38) and took effective action (Joint Br., pp. 24, 41-48), but that if they did not make a proper investigation or take effective action, it was because they were powerless to do so (*see* Joint Br., pp. 10, 12-13, 28). Such pleading in the alternative cannot refute the fact that the evidence below established a *prima facie* case of violations of both the Commodity Exchange Act and the antitrust laws.

A. The Facts Introduced Below

1. Allied's effect on the market

The Trustee has set forth in his main brief the details of DeAngelis' activities and their impact on the market (App. Br., pp. 12-15, Appendix II). Defendants focus on

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* There can be no doubt that defendants substantially contributed to Haupt's loss and that is sufficient to establish legal causation. RESTATEMENT (SECOND) OF TORTS § 431 (1965). Under Section 4 of the Clayton Act, 15 U.S.C. § 15, plaintiff need only show that the defendants "materially contributed to plaintiff's injury," *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 702 (1962), "notwithstanding other factors contributed also." *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37, 43 (1st Cir. 1948), *cert. denied*, 366 U.S. 967 (1949).

two aspects of those activities, asserting in a footnote that the Trustee failed to prove there was a manipulation (Joint Br., p. 28 fn.) and further that the extraordinary volume of ex-pit transactions was legitimate (Joint Br., pp. 30-32; Bunge Br., pp. 26-32). Professors Gray and Farris as well as defendant Anderson all testified that there was a manipulation (JA 1254a-56a, 1641a-42a, 2002a-06a). Further, DeAngelis himself testified that he had no valid business reason for accumulating his huge futures position and that he acted only to stabilize prices (JA 1050a-52a, 1087a-88a).*

In urging the legality of the ex-pit transactions, defendants ignore the following facts: (a) the ex-pits were used for financing (Joint Br., p. 32; Bunge Br., p. 26) —a use which the Trustee's trade expert, Robert L. Raclin, would have testified was itself improper (JA 1951a; App. Br., p. 60); (b) the ex-pits were part of Allied's scheme to manipulate the market (App. Br., Appendix II); (c) as Professor Gray pointed out, there was no actual sale of cash oil (transfer of beneficial ownership) and therefore these transactions violated Exchange Rule 6-B (*see* App. Br., p. 14 fn., Appendix II);** and (d) the CEA was concerned about the ex-pits right from the start (Pl. Ex. 41; JA 860a-61a).*** Indeed, the OIG Report (Def.

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* Manipulation is an intentional act designed to achieve some economic advantage by introducing into the market factors not relating to the economic realities of supply and demand. Manipulation may take the form of an artificial stimulus applied to market prices causing prices to rise, fall or remain at a level which has no relation to legitimate business needs or activities. *See, e.g., Cargill, Inc.* v. *Hardin*, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); JA 262a, 1636a, 1638a-41a, 1752a-55a, 2002a.

** Defendants attempt to rely on Professor Dahl in support of their position (Bunge Br., pp. 28-29). Unlike Professor Gray, however, Professor Dahl did not review any of the specific ex-pit transactions in dispute (JA 359a-60a), and his inability to state whether the particular transactions in question were or were not justified must be analyzed in that context.

*** As early as February, 1963, T. Reed McMinn of the CEA expressed concern about the large and unusual ex-pit trades taking place (Pl. Ex. 41). He discussed these transactions with Berg who

Ex. 211 id.) clearly contradicts Bunge's assertion that the CEA considered such ex-pits to be proper (Bunge Br., p. 29):

> CEA New York officials stated to OIG that the volume of ex-pit trading might be misleading and have the effect of holding prices at a high level. Also, other traders might be influenced by the statistics and might think the price reasonable since they see a large volume of trades.
>
> * * * *
>
> On October 7, 1963, CEA New York advised CEA Washington that they doubted that DeAngelis' ex-pit trades were a proper function in the free market. No action was taken because CEA Washington felt ex-pit trades were the responsibility of exchanges. (OIG Report, pp. 48-49).

2. *Defendants were aware of unusual market conditions*

Defendants admit knowledge of the unprecedented increases in the volume of trading, deliveries, open interest, concentration of the long and short positions, disappearance of small traders, and the extraordinary increase in ex-pit trades. But despite the clear record evidence to the contrary (App. Br., pp. 17-28), defendants deny that such factors constituted warnings (Joint Br., pp. 28-32). Instead they assert that these were signs of a "healthy market," "confirmation that the market was serving a real economic function" and "commercially logical" (Joint Br., pp. 29-31).

Such an approach is much too facile. Here too, defendants would have the Court ignore the testimony—including their own statements. For example, in June 1963, MacDonald was worried by the marked increase in concentration in the hands of large traders—"It didn't feel right to me" (JA 518a-19a). MacDonald was aware that the

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assured him that they were legitimate (Pl. Ex. 41). McMinn admittedly relied upon Berg's opinion and did not investigate further (JA 890a).

market was being used to obtain cash oil (JA 903a-04a, 917a), which, as Professor Gray explained, was contrary to its normal economic function (JA 1786.1a-86.4a). Anderson even stated that the futures contract might have to be changed (JA 1183.1a-83.3a).

Other evidence demonstrated that the market was unstable and unhealthy in 1963. Thus, as shown by the Weinstein letters (Pl. Exs. 27 and 28), by mid-August the Clearing Association was very concerned that the market was unhealthy, citing the increasing concentration and huge volume of ex-pit transactions. And when MacDonald told the Board of Managers that unusual trading was going on, and that the old-timers had never seen anything like it before, no one disagreed (JA 574a-75a).

In addition, the experts all testified that the signs, which defendants admittedly were aware of, demonstrated that the market was unhealthy and that an investigation by the Exchange was required.* For example, Professor Gray testified that the unusual change in the composition of the open interest (Pl. Ex. 124) should have alerted the Board to the need for further investigation by early August (JA 1690a-91.2a, 1700a-01a). Professor Farris testified that based upon information reflected in Pl. Exs. 122, 123 and 124, he would have been concerned about the health of the market (JA 1982a-83a). Both Gray and Farris testified that the extraordinary ex-pit transactions should have been a cause for concern and investigation no later than *May,* 1963 (JA 1692a, 1996a). Surely, an increase from 434 to 35,438 futures contracts traded ex-pit in one year (Pl. Ex. 126) is not "commercially logical" as defendants contend (Joint Br., p. 31).

Professor Dahl testified that the information reflected on Pl. Exs. 122-126, which was available to the Board on a regular basis, established that the cottonseed oil futures

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* Defendants suggest that information regarding deliveries and ex-pits was not considered important enough to be compiled or published during 1963 (Joint Br., p. 29). The Exchange itself kept records of *both* (JA 698a-99a, 704a-05a, 732a).

market was unstable (JA 332a-33a, 337a-38a). Even defendant's expert, Professor Arthur, admitted (a) that if he had been a member of the Exchange Board in 1963, he would have investigated the cause of such a huge volume of ex-pit trades (JA 1833a-33.3a) and would have been concerned if he had received the Weinstein letters (JA 1835.1a-35.3a); and (b) that the huge jump in concentration was a sign of something unusual (JA 1834.1a).*

The Trustee's evidence also showed that there was an increase in the short speculative interest, calculated buying at the close, a distorted relationship between the price of cash and futures, and an unprecedented movement of warehouse receipts making necessary a unique recall and re-validation (App. Br., pp. 14, 18, 20). In their briefs, defendants conveniently ignore these factors, and for good reason: These factors are indisputably *warning signs* and defendants either knew or should have known of them.

Under such circumstances, defendants can hardly deny their ability to detect unstable market conditions.**

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* Additional proof offered by the Trustee to demonstrate that the available market data constituted warnings of unstable market conditions was erroneously excluded by the Trial Court (App. Br., pp. 63-66). Thus, Perry Moore would have testified that during 1963 even traders on the Cotton Exchange were discussing the chaotic conditions on the Produce Exchange; and that, quite apart from information reflected in Clearing Association records, he believed there were sufficient warning signs to compel reasonable regulators to take corrective action (App. Br., pp. 63-64). Further, the various statistical charts offered by the Trustee (*e.g.*, Pl. Exs. 124a id., 125a id., 126d id., 130 id., 131 id., 131a id., 133a id., 134 id.) depict the dramatic change which occurred in the relevant market indices during 1963, thereby compelling the inference that everyone involved in the trade had to know of the danger to orderly marketing conditions "from the inherent quality of the occurrences or circumstances." *See Equitable Life Assurance Society* v. *Saftlas*, 38 F. Supp. 708, 712 (E.D. Pa. 1941), *aff'd*, 129 F.2d 326 (3d Cir. 1942).

Defendants claim that the Trustee did not offer Pl. Exs. 131a id. and 133a id. (Joint Br., p. 81). They are wrong—JA 1622a-24a.

**Defendant Vogel is conspicuous in his claimed ignorance of what was going on in the market and in his utter failure to keep himself apprised of market conditions (JA 1481a-87a, 1520a). Vogel claimed he did not even know what an ex-pit transaction was (JA 1486-87a). Far from exculpating him, Vogel's ignorance makes him

3. *Although they had sufficient knowledge and power, defendants failed to make a proper investigation or to take effective action in 1963*

(a) Prior to November 14

Even though they claim there were no warning signs requiring investigation, defendants nonetheless insist that they made adequate inquiry into Allied's activities (Joint Br., pp. 33-38).* In fact, however, defendants did not even reach for the information readily within their grasp—including that available through:

(i) a request to the Clearing Association to obtain positions (JA 1700a-02a, 1988a);

(ii) an analysis of the documentation underlying the ex-pit transactions (JA 1701a)—indeed the Exchange never enforced its own rule requiring documentation to be submitted in connection with every ex-pit trade (App. Br., p. 35 fn.); and

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as liable as those who were familiar with the market (see *infra*, pp. 32-33). It is of no moment that specific occurrences may not have been reported to Vogel or that Vogel was not privy to trade gossip (Continental Br., pp. 8-10); the published warning signs were sufficient to put Vogel on notice that something was amiss in the market (JA 1982a-84a). One need not be "an analyst of market information" (Continental Br., p. 9) to recognize the significance of a jump in the volume of trading from 8,000 to 14,000 contracts in a single month (Pl. Ex. 122). As excuse for his own ignorance, Vogel can only distort the testimony of Professor Dahl who stated that, as a public director of the Minneapolis Grain Exchange, he relied on the Exchange's staff and business conduct committee to report and investigate "any suspicious actions" (JA 324a). But it is clear that Dahl did not rely on them to "identify statistical signs of trouble" (Continental Br., p. 9). Unlike Vogel, who did not follow government publications on market conditions (JA 1483a-84a, 1486a), Dahl subscribed to such publications, read them regularly, and visited the floor of the Exchange (JA 306a, 311a). In short, Dahl conscientiously fulfilled his duties as a director; Vogel did not.

* The lynchpin of defendants' purported investigation is Berg's so-called request to the CEA in July for Allied's position (Joint Br., pp. 33-34). Defendants assert that they were reassured by the denial of this request (Joint Br., p. 34). Berg, however, did not recall ever making such a request (JA 781a). Even assuming that such a call took place, Professor Gray testified that it was an inadequate response to the warning signs present at that time (JA 1783a-84a).

(iii) a review of the documentation in support of Allied's claim to be hedged (JA 1711a-12a, 1994a-95a)—when Berg met with DeAngelis in September, he never requested any documentation showing Allied's futures position and the extent to which it was hedged (JA 752a, 764a-71a).*

At their September meeting, Berg learned from DeAngelis that Allied held 50% of the open long cottonseed oil futures contracts (JA 786a), a concentration which, according to Professors Gray and Farris, threatened market stability (JA 1705a-06a, 1711a-13a, 1994a-95a). Berg apparently shared the same view since he claimed that he intended to ask DeAngelis to reduce his position (JA 784a). Before Berg could ask, DeAngelis volunteered to do so to avoid disorderly marketing conditions (JA 782a, 784a-85a). Berg informed MacDonald of this conversation (JA 676a). Thereafter, DeAngelis ignored his promise and continued his buying spree. Incredibly, neither Berg nor MacDonald subsequently ever asked DeAngelis, or made any other attempt to determine, whether he had in

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* The Exchange had abundant power to conduct a full inquiry (App. Br., p. 29). It simply failed to exercise it.

The only effort expended by the Exchange was to meet with the Clearing Association on September 23. At this meeting MacDonald and Fashena concurred in a proposal of the Clearing Association to impose a scale-up margin only after it was agreed that the increased margins would not hurt business on the Produce Exchange. Defendants, accusing the Trustee of substituting sarcasm for fact, claim that this characterization of the September 23 meeting is entirely untrue (Produce Exch. Br., p. 7). Nevertheless, the only contemporaneous document—Boyer's notes of the September 23 meeting (Pl. Ex. 15a)—supports the Trustee's position:

> Conclusion—The imposition of a scale-up system of original margin requirements by the clearing house will not adversely affect the best interests of the Exchange and will not adversely affect the volume of trading or the opportunity to bring in new business on the Exchange.

In any event, Professor Gray testified that imposition of the scale-up margin was insufficient in light of the unstable condition of the market in the Fall of 1963, particularly in view of the five-week delay between announcement of the increased margin requirement and its effective date (JA 1785a-86a).

fact reduced his position (JA 782a-83a, 787a; *see also* App. Br., p. 34).*

Defendants would have this Court believe that the Trustee contends they should have investigated Haupt (Joint Br., pp. 24-25). To the contrary, the Trustee has always contended that the defendants should have investigated *Allied;* and indeed that they should have done so long before September when Haupt began to clear a substantial number of contracts for Allied (JA 1774.1a-76a; Def. Ex. 214).

When defendants did contact Haupt (Joint Br., p. 25), their "concern" was Haupt's financial condition, not maintenance of an orderly market. Thus, at his September, 1963 meeting with Stevens, Berg inquired whether Haupt's financial position had changed from that indicated on the financial statement Haupt had previously filed with the Produce Exchange (JA 746a-47a). At this meeting, Berg learned that Haupt had capital in excess of $8 million (JA 746a-47a). Thereafter, Berg and MacDonald were not worried (JA 733a).**

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* Berg testified unequivocally that it was not until November 14 that he learned DeAngelis had failed to reduce his position as promised; and that he made no effort in the interim to determine whether DeAngelis kept his promise (JA 782a-83a, 787a). MacDonald's testimony contradicts Berg. He claims that Berg told him that he called DeAngelis in late September or early October to ask DeAngelis why he did not reduce his position (JA 545a, 546a, 675a, 680a). MacDonald further testified that he was not inclined to believe DeAngelis' reason for failing to reduce his position, and that he would want more than just DeAngelis' word on it (JA 676a-77a); however, by his own admission MacDonald did nothing (JA 676a), choosing instead to sit back while DeAngelis continued his manipulation and increased his position to enormous proportions.

This lackadaisical approach contrasts sharply with that of the Chicago Board of Trade. When DeAngelis achieved slightly over 40% of the March soybean oil futures contracts traded on the Board of Trade, its Business Conduct Committee conducted an investigation JA 1127a-29a, 1130a-31a; Pl. Exs. 45a-d id., 45e, 45f-bb id.); and then directed Allied, through its broker, Ralph Peters & Co., to cease maintaining such an "overwhelming position" (Pl. Exs. 45o id.; 45q id.) The District Court erroneously excluded this evidence as irrelevant (JA 193.1a [Sept. 16, 1975]).

** Thus, MacDonald testified that he knew Haupt had a lot of money (JA 678a-79.1a) and that he believed that as long as Haupt

Satisfied that Haupt had sufficient assets to fund a substantial market decline, defendants sat back and allowed the market to run its inexorable course—while they profited at Haupt's expense. The public interest was totally ignored.

(b) November 14-20

Defendants urge that the events of November 14-20 did not require more than minimal action (Joint Br., pp. 39-40), and therefore that their failures to act do not raise any inference of bad faith.

If nothing else, defendants' actions were "minimal." Defendants assert that in order to determine interest in a voluntary liquidation—having traders who were "short" agree to take over Allied's long contracts—they could not use the list showing the positions of the traders (long and short) which the CEA had furnished to them (Pl. Ex. 1). Rather, to avoid "panic," they claim they had to know which brokers held those positions and, notwithstanding the fact that many of the significant traders and brokers were represented at the Board meeting of November 14, they had to send out a letter to themselves and others returnable 5 days later (Joint Br., pp. 42-43). Obviously if defendants had wanted additional information they would have used the telephone. But in fact such information was superfluous. Defendants already knew the brokers* and they also knew that there would be no interest in a voluntary liquidation.

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had enough money to meet margin calls, he did not have any worry concerning Allied's financial condition (JA 611a). Perhaps this is why he never investigated whether Allied reduced its huge position following Berg's meeting with DeAngelis. On November 18 when he learned from DeAngelis that Allied could only withstand another 12½ point drop, MacDonald still was not worried—he assumed Haupt would make up the difference (JA 618a-19a).

* Interestingly, when Anderson attempted to effectuate a voluntary transfer of Allied's position held by Haupt, he simply called potential customers directly (App. Br., p. 38 fn.**). Apparently, on November 19, once the clearing members holding short positions had collected the bulk of Haupt's variation margin payments, defendants were no longer concerned that normal telephone contact with traders would generate "panic."

Defendants claim that it was not until November 19 that they knew sufficient facts to warrant closing the market (Joint Br., pp. 46-47; Merrill Lynch Br., pp. 19-20). But, once again, defendants ignore the critical facts which are present in the record (App. Br., pp. 35-39). On November 14, defendants knew that prices were too high, that Allied held 90% of the long position, and that only a handful of large traders held the short position (Pl. Ex. 1). It was obvious that no one would voluntarily take over Allied's contracts. Instead, prices would fall, the shorts would profit, sooner or later Allied and Haupt would run out of money, and intervention would be required to remove Allied's contracts from the market (App. Br., pp. 38-39).* However, in furtherance of their own economic self-interest, defendants chose to play a waiting game. The only difference between November 14th and November 19th was that Haupt did run out of money. At that point, the trader-regulators knew that they would have to fund any further market decline (JA 460a-61a, 621a, 734a-35a, 1241a-43a, 1500a) and so they closed the market (App. Br., p. 42).**

Lacking any legitimate reason to explain their failures, defendants assert that the Trustee's experts would not have closed the market on November 14 (Joint Br., p. 40). Defendants ignore the main thrust of this expert testimony —Professors Gray and Farris stressed that meaningful

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* Defendants knew that the scale-up margin would take effect on November 15. Based upon general indications of the size of Allied's position at Haupt (JA 478a-80a), it did not take very much imagination on November 14 to conclude that Haupt would have to pay millions of dollars to the Clearing Association the next day.

** And when they closed the market, defendants fixed the settlement price at an artificially low level, giving the shorts still further profits (App. Br., pp. 42-43). This makes a mockery of defendants' claim that the imposition of a 25-point fluctuation limit effective November 19 "favored" the holders of the long position—Haupt and Allied (Joint Br., pp. 45-46). Any salutary effect of this action was promptly eliminated when these same trader-regulators fixed the final settlement price substantially below the November 19 closing price (JA 832a-34a).

regulatory action should have been taken long before that time (JA 1699a-00a, 2013a).*

4. *Defendants Cannot Avoid Having the Issue of Bad Faith Regulation Submitted to a Jury*

The events which occurred during 1963 demonstrate graphically what can happen when those persons who stand to benefit the most make the critical market decisions (App. Br., pp. 36-44). Seemingly aware of this inherent conflict, defendants desperately argue that they were not trader-regulators. Their argument is a sham.

Defendant Anderson, head of the commodities department at Merrill Lynch, the largest commodity brokerage firm in the United States (*see* JA 1234a), suggests that his department was a "service division," not a "sales division," and was basically involved in research (Merrill Lynch Br., p. 3). This is preposterous (*see, e.g.,* JA 884a).** Ander-

* To the extent that there might be viable alternatives to closing the market which defendants could have invoked on November 14, such as Fashena's suggestion to permit trading for liquidation only (JA 1234a), the short answer is that defendants did not utilize any of them.

Defendants falsely claim that the CEA did not criticize their actions (Joint Br., p. 45). On November 15, after MacDonald told Alex Caldwell about the position call and stated his view that the situation presented a good opportunity to sell oil, Caldwell discussed the situation with the Assistant Secretary of Agriculture. Caldwell then called MacDonald back and, at the direction of the Assistant Secretary, read to MacDonald the portion of the Act that gives the CEA power to bring charges against an exchange if it fails to carry out its obligation to maintain an orderly market (JA 599a-00a; 7 U.S.C. § 7b). On November 15, the CEA did not just criticize the Exchange; it threatened to bring charges against it.

** Thus, in seven separate months during 1963, Merrill Lynch was involved in 10% or more of all trades which occurred on the Produce Exchange (Pl. Ex. 131 id.).

With the exception of the [illegible] of April, Merrill Lynch was net short throughout 1963 (JA 3176; Pl. Ex. 131 id.). On November 14th, Merrill Lynch held, as broker, more than 20% of all short cottonseed oil futures contracts (*compare* Pl. Exs. 131 id. *with* 217). During the November 14-19 period, Merrill Lynch sold on behalf of its customers net 408 contracts (Pl. Ex. 217) and its customers profited handsomely in the declining market.

son's claim that he is not a trader-regulator because he did not personally trade (Merrill Lynch Br., p. 2) is equally specious. Anderson was head of the department; the traders worked under him. When important and difficult trading questions arose, Anderson himself participated in the decisions (JA 1228a-33a, 1272a-73a).

Defendant Vogel also claims that he was not a trader-regulator because he personally "had nothing whatever to do with the cottonseed oil trade" (Continental Br., p. 3).* Vogel asserts that he was on the Board of the Produce Exchange as a representative of the grain trade (Continental Br., p. 3), even though grain was not traded on

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* At trial, Vogel claimed he had no knowledge, responsibility or involvement with vegetable oils or with Allied. Given the extraordinary business relationship between Continental and Allied, such testimony, and the "corroborative" testimony of the other Continental witnesses, is inherently unbelievable.

Vogel claimed that during 1963 he never discussed the condition of the cottonseed oil futures market, Continental's activities in cottonseed oil, or dealings with Allied with Raphael Totah, head of Continental's oil department (JA 1488a-89a), even though they chatted from time to time (JA 1493a). Totah testified that Vogel, Fribourg and himself never met during 1963 (JA 1602a) and, indeed, that there were no meetings of department heads at Continental (JA 1601a), not even to discuss the restructuring of the company which occurred in March, 1963 (JA 1601a-02a). Although George Stafford, Continental's chief oil trader, had testified, during pre-trial discovery that he routinely reported to Vogel on oil department matters over a seven-year period in the absence of Continental's president, Michel Fribourg (JA 1583a-85a, 1592a), he retracted his testimony at trial claiming that it was based on "assumptions" rather than "facts" (JA 1584a-86a).

Vogel also testified that he never received any internal financial or accounting statements, or any other documents, concerning the activities of the oil department (JA 1493a) or relating to Continental's dealings with DeAngelis (which included $35 million in financing during 1963—JA 1447a-48a) (JA 1494a). In light of this testimony, one can only speculate as to what Vogel could possibly have responded when Berg called him to verify what DeAngelis had stated at their September meeting regarding Continental's financing of Allied (JA 753a).

Vogel claims to have known nothing about the condition of the cottonseed oil futures market during 1963 and proudly testified that he rarely attended Board meetings (JA 1480a, 1471a-87a, 1520a). He asserted that when, on November 18, Berg called him to get

the Produce Exchange, and his employer Continental was a substantial factor in the cottonseed oil futures market (holding more than 10% of the open short position on November 14, 1963; see Pl. Ex. 1). So substantial was Continental's interest that, when the trader-regulators kept the Produce Exchange open from November 14-19 and thereafter fixed the settlement price at a very low level, Continental earned $2.1 million on its large short position in cottonseed oil futures alone.*

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approval for the imposition of a 25-point price fluctuation limit because of the market callapse, he went along even though he was unaware of the problem. Vogel stated that he did not even ask Berg for an explanation (JA 1519a).

Finally, Vogel claims that he had no idea whether or not his vote to close the market on November 19 benefitted Continental. Even up to the day of trial—some 12 years later—Vogel claimed not to know that Continental made $2.1 million on its short position in cottonseed oil (JA 1334.1a, 1520.1a; Pl. Ex. 258).

* Continental also gained $3,916,470 on its large short position in soybean oil futures (Pl. Ex. 150 id.).

Continental attempts to detract from the inference of bad faith which naturally flows from the $6 million profits it earned on its vegetable oil position during the November 14-19 period by arguing that it lost $101,000 on cottonseed oil trades (Continental Br., p. 13. Continental bases this contention on the superficial argument that it was a net buyer of futures contracts in a falling market (Continental Br., p. 13; *see* p. 2) and on the testimony of John Ferretti, a Continental employee, which testimony, in turn, was based on Def. Ex. 154 id. (JA 1474a-77a). However, although Def. Ex. 154 id. was initially accepted in evidence (JA 1578a), it was later stricken (JA 1807a) after the Trustee satisfied the Court that its admission was improper.

In fact, Continental profited on its trading activities during the November 14-19 period. Thus, as demonstrated by Pl. Ex. 262 id., the activities of Continental in purchasing 516 contracts on November 15, 1963, amounted to no more than a close-out (at 13.58 cents per pound) of a pre-existing short position established on October 30 and 31. While sustaining a relatively minor loss on these transactions ($99,312), Continental breezed through the final days of the market with an overall cottonseed oil futures trading profit of $812,933 (Pl. Ex. 262 id.). Only through accounting legerdemain (based on an application of the after-the-fact November 20 close-out price [11.17 cents per pound] to contracts which Continental *no longer* held on that date) was Ferretti able to suggest in his stricken exhibit and related testimony that Continental lost not $99,312 but $746,136 on its November 15 "purchase" of 516 contracts (JA 1576a-77a).

Defendant Klein also claims he was not a trader-regulator because, like Anderson, he was an executive (Bunge Br., p. 4), and like Vogel, he was representing the grain trade (Bunge Br., p. 4). These arguments lack merit.

Cottonseed oil was the only commodity actively traded on the Produce Exchange during 1963 (JA 528a). The Exchange's only contact with grain was an inspection service (JA 1419a)—hardly sufficient business to warrant two of the five members of its executive committee (Klein and Vogel) serving as representatives of the grain trade. This is an argument manufactured for trial.

As President of Bunge, Klein had overall management responsibility (JA 1422a; *see also* JA 1359a, 1371a-72a); while Klein did not personally trade commodities, his employees did. The vegetable oil business accounted for 10-15% of Bunge's total business (JA 1376a) and Bunge was an active trader in the cottonseed oil futures market (*see, e.g.*, Pl. Ex. 141). Moreover, when the cottonseed oil market was about to collapse, it was Klein who gave the order for Bunge to sell vegetable oil futures (JA 1294a). As a result of Klein's direct order, Bunge gained over $2,000,000 during the period November 14-20.*

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* In their brief, defendants Klein and Bunge argue that although Bunge made substantial monies on the short sale of vegetable oil futures for its own account during the period November 14-20, it lost even more money because of certain long contracts which it held as broker for Allied (Bunge Br., pp. 6-8). This argument has *no support* in the record.

The record does reflect that Bunge held 3,500 long vegetable oil contracts on behalf of Allied—indeed, these contracts were received in the course of the ex-pit registered warehouse receipt financing transactions which brought Bunge immense profits (Pl. Exs. 260 id. and 261 id.)—and that the soybean oil contracts were sold on November 19 when Allied failed to meet its margin calls (JA 1232a). However, the record is *silent* with respect to the price at which such contracts were sold, the amount of original margin which Bunge received back from the Board of Trade, or any other data which would enable the trier of fact to determine whether Bunge actually lost money, as it claims, on these and the related transactions. In this connection, it is instructive that Bunge never filed any claim for losses in the Allied bankruptcy. *Matter of Allied Crude Vegetable Refining Corp., Bankrupt,* 64 B 7036 (D.C.N.J. 1964).

Finally, while defendant MacDonald admits that he was a trader as well as a regulator, he argues that there is no basis for liability because his employer made no profits in cottonseed oil futures and he had no motive to injure Haupt (Produce Exch. Br., p. 3). However, MacDonald, while President of this "self-regulating" body, acted in reckless disregard of the public interest and ignored his statutory responsibilities.* MacDonald saw no harm in keeping the market open while Bunge, Continental and others profited at Haupt's expense. At trial, MacDonald admitted that he believed the price of cottonseed oil futures was too high on November 14 and that he assumed that without Allied's activities the price would have been lower (JA 562a). This opinion undoubtedly sharply colored MacDonald's view of the market and prevented him from treating Haupt fairly.

When the market started to fall on November 15, MacDonald (as he told Caldwell) simply saw the situation as "a good opportunity to sell oil" (JA 598a-99a). While he attempted to squirm out of his prior admissions (JA 604a-07a), MacDonald finally admitted testifying in 1965, when his memory was much better than at trial, that he did not like Caldwell's suggestion to close the market on November 14 because MacDonald believed that prices were "too high." He thought it "fairer" to close the market on the 20th when prices had dropped a few cents (JA 604a-05a). Those "few cents" cost Haupt $12,000,000!

MacDonald was not worried when he learned on November 18 that Allied could withstand only another ⅛ cent

* In the context of this case such reckless and wanton disregard of statutory responsibilities is tantamount to bad faith. The limited immunity from the antitrust laws enjoyed by contract markets is narrowly construed to encompass only those restraints of trade essential to carry out the purposes of the Act (App. Br., pp. 46-47). Not only is such immunity lost when a market is regulated by persons acting to favor their own pecuniary interests; it is also lost when the regulators exhibit a reckless disregard for their responsibilities and totally ignore the public interest. Defendants' assertions to the contrary notwithstanding (Joint Br., p. 72), the issue of recklessness is preserved (R. 280; JA 2098a) and the Trial Court's refusal to submit it to the jury constitutes reversible error.

per pound drop, since he assumed Haupt would make up the difference (JA 619a).* When, however, on November 19, Haupt announced that it would default on any further obligations to the Clearing Association, MacDonald worried that other clearing members and trade houses—including his own—would suffer losses and voted to close the market (JA 620a-21a).

Defendants' actions during the period November 14-20 dramatically demonstrate their bad faith in regulating the Produce Exchange for the benefit of the holders of the short position, including themselves, at the expense of Haupt and the general public. It is hardly surprising to find such selfish conduct by defendants. As the Chairman of the Commodities Futures Trading Commission recently said with respect to the potato futures market:

> If this exchange board is dominated by traders in the market it is supposed to be watching, you have a conflict of interest . . . . *The Wall Street Journal*, June 22, 1976, p. 26, col. 1.

B. *The Governing Legal Standards*

1. *The Antitrust Laws*

Defendants err in contending that the Trustee's antitrust claim must fail for lack of proof of combination or conspiracy. They argue that "what plaintiff complains of here is defendants' alleged failure to act [and] . . . [i]naction, unless it is pursuant to some agreement, does not violate the antitrust laws" (Joint Br., p. 69). This ignores the facts and evidences a total misunderstanding of the nature of the Trustee's antitrust claims.**

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* He did not even bother to inform Haupt that its customer was going bankrupt (JA 675a).

** The defendants place much emphasis on what they characterize as their "failure to act," apparently contending that the failure to perform an act which one is under a duty to perform is somehow different from the performance of an otherwise prohibited act. This contention is both irrelevant to the Trustee's antitrust claim and is contrary to well established principles of criminal and civil law. *See,*

Haupt suffered injury as a direct result of the defendants' bad faith regulation of the Exchange when, pursuant to the Exchange Rules (Pl. Ex. 56, Rule 25; *see* Pl. Ex. 59 id., Sec. 23), it was forced to pay out $12,000,000 in variation margin as the price of cottonseed oil futures collapsed in November, 1963. *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963), confirms that a combination or conspiracy can exist without defendants affirmatively signifying their assent to engage or not engage in a particular course of conduct with a common goal in mind. The very operation of the Produce Exchange constituted a combination in restraint of trade (*Id.* at 348 fn. 5) and defendants' acts and failures to act were exempt from the antitrust laws only so long as the Produce Exchange was regulated in good faith (App. Br., pp. 46-47).

McCreery Angus Farm v. *American Angus Ass'n*, 379 F. Supp. 1008 (S.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. 1974), the only case cited by defendants which addresses this point, supports the Trustee's position. In *McCreery*, the plaintiffs brought suit under the Sherman Act, contending that the defendant association improperly excluded them from membership. There, as here, the defendants contended that

> 'there is not one word of testimony of any agreement among the parties to a conspiracy or to a combination. There is not one iota of evidence that any of the conspirators in any way entered into any agreement.' *Id.* at 1017.

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e.g., N.Y. Penal Law § 15.00(5) (McKinney 1975); Prosser, Law of Torts § 56 (4th Ed. 1971).

Assuming *arguendo* the need for affirmative action, examples abound in the record. These include defendants' monthly Board meetings where they jointly took various steps, however ineffective, concerning the market (Joint Br., pp. 33-38). Further, during the period November 14-20 defendants locked in the Exchange safe the CEA sheet showing that Allied held 90% of the market, voted to establish a control committee to mail out a useless position call and, when Haupt ran out of money to fund the price decline, they closed the market and fixed the price at which all contracts would be settled (App. Br., pp. 36-39, 41-43).

The identical argument made by defendants herein should be rejected for the same reasons announced by the *McCreery* Court:

> The Defendants' contention is not well taken. The requisite agreement needed to bring the activity in question within the ambit of the Sherman Act is provided by the very bylaw under which the Defendants are alleged to have acted. In Silver *v.* New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), the Supreme Court found the bylaws of the Exchange pursuant to which the Plaintiffs' direct wire privileges were suspended provided the sufficient 'agreement'. As stated in one comment, '*The mere involvement of an association generally would provide the requisite element of combination or conspiracy.*' *Id.* (Emphasis supplied).

Finally, defendants make the *in terrorem* argument that to permit this antitrust claim "would convert every action against an exchange for failure to regulate into a treble damage antitrust suit" (Joint Br., pp. 69-70). The Trustee does not contend that mere negligent regulation destroys an exchange's antitrust exemption; only that bad faith regulation is actionable under the antitrust laws (App. Br., p. 47). *Cf. Lagorio* v. *Board of Trade*, 529 F.2d 1290, 1292 (7th Cir. 1976). The defendants, whose bad faith regulation and breach of fiduciary duties resulted in one of the worst financial disasters in American history, are hardly in a position to complain that the treble damage sanction of the antitrust laws provides too harsh a remedy and sets too severe an example.

2. *The Commodity Exchange Act*

Defendants' assertions to the contrary notwithstanding, the Trustee may maintain a private right of action under the Commodity Exchange Act, *Case & Co.* v. *Board of Trade,* 523 F.2d 355, 360 (7th Cir. 1975); *see also Deaktor*

v. *L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir. 1973), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), and brokers are within the class permitted to sue thereunder. *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974); *see Collins* v. *PBW Stock Exchange, Inc.*, 408 F. Supp. 1344, 1349-52 (E.D. Pa. 1976); *Lank* v. *New York Stock Exchange*, 405 F. Supp. 1031, 1036-37 (S.D. N.Y. 1975).

That the Trustee has proven a *prima facie* case under the Commodity Exchange Act is beyond peradventure (App. Br., pp. 9-44, 49-51; *see supra*, pp. 12-27). Defendants now argue that 7 U.S.C. § 7(d) merely required the Produce Exchange to *enact* rules providing for the prevention of manipulation, but did not require the Exchange to *enforce* its rules (Joint Br., pp. 59-60).* This is an astonishing and audacious proposition for Board members of a self-regulated market to make and amounts to a virtual confession that defendants considered self-regulation to be a sham and the Exchange a private preserve established for their own benefit.

Defendants also assert that negligence is insufficient to establish liability. Relying on cases involving violations of Section 10(b) of the Securities Exchange Act of 1934, they argue that there must also be an element of scienter (Joint Br., pp. 61-62). This reliance is misplaced. As the Supreme Court held in *Ernst & Ernst* v. *Hochfelder*, —U.S.—, 96 S.Ct. 1375 (1976), the basis for imposing a scienter requirement in Section 10(b) cases lies in the specific language of that section and its legislative history which address "practices that involve some element of

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* Defendants support this unique proposition by reference to the 1968 and 1974 amendments to the Act, 7 U.S.C. § 7a, wherein the duty to enforce such rules was made explicit. The legislative history of Section 7a, however, shows that these amendments were intended merely to clarify the implicit duty of enforcement under Section 7(d) which some exchanges had failed to carry out. S. Rep. 90-947, 90th Cong., 2d Sess. 2-3 (1968).

scienter." 96 S.Ct. at 1385. No such comparable statutory language or history exists for the Commodity Exchange Act.

Furthermore, none of defendants' cases relate to the liability of an exchange for failure to properly regulate a market. To impose a scienter requirement in such a case would allow the most negligent or reckless acts of market regulators to go unchecked. Such a result would be severely detrimental to the public interest and contrary to the weight of authority. *Rich* v. *New York Stock Exchange,* 522 F.2d 153 (2d Cir. 1975); *Baird* v. *Franklin,* 141 F.2d 283 (2d Cir. 1944), *cert. denied,* 323 U.S. 737 (1944); *Pettit* v. *American Stock Exchange,* 217 F. Supp. 21, 29-30 (S.D.N.Y. 1963).

In its landmark decision in *Baird* v. *Franklin, supra,* this Court found that a cause of action could be stated for an exchange's negligent failure to enforce its rules. This Court recently reaffirmed that proposition in *Rich* v. *New York Stock Exchange, supra* at 155 n.4:

> *Baird* v. *Franklin* . . . recognized the duty of the New York Stock Exchange imposed by Section 6(b) [of the Securities Exchange Act] 'to investigate the dealings and the financial conditions of the members and to suspend or expel members who it had reason to believe had been guilty of conduct inconsistent with just and equitable principles of trade.' 141 F.2d at 239. . . . [B]oth the elaborate partial dissent by Judge Clark and the majority opinion by Judge Augustus Hand recognized that the Exchange might be liable to private investors for a breach of this duty. *Baird* also recognized that actual knowledge of member's misconduct was not a prerequisite to Exchange liability. *Id.* at 234. *And subsequent decisions,* while being careful not to hold the Exchange to a duty of supervision that is unrealistic *have upheld claims on what is essentially a negligence standard.* (Citations omitted; emphasis supplied.)

In a last ditch effort to exculpate themselves from liability for negligent failure to regulate, defendants Vogel and Klein assert that they were unfamiliar with cottonseed oil futures trading and therefore were in essence "outside" directors (Continental Br., pp. 3-6; Bunge Br., pp. 4-5). The facts simply cannot support such a proposition.

The inside/outside director dichotomy is viable only where the outside directors are distinct from the decision-makers of a corporation, as was the case in *Lanza v. Drexel,* 479 F.2d 1277 (2d Cir. 1973), and *Barnes* v. *Andrews,* 298 F. 614, 618 (S.D.N.Y. 1924). The Produce Exchange had no such distinction—there were no regulators more "inside" than the defendants. Unlike the Minneapolis Grain Exchange which has a public director (JA 261a), all members of the Board of Managers were businessmen whose companies traded vegetable oil futures. All had equal access to relevant market information and all shared equal responsibility under the law.*

The claim that Vogel and Klein chose to miss Board meetings, failed to read market data and otherwise did not fully participate in Exchange activities during 1963 is not a defense—it is an indictment! Market regulators certainly have no less a duty than company directors to keep themselves adequately informed, and they must be held liable for failing to do so. *See, e.g., Michelsen* v. *Penney,* 135 F.2d 408 (2d Cir. 1943); *Harman* v. *Willbern,* 374 F. Supp. 1149 (D. Kan. 1974), *aff'd,* 520 F.2d 1333 (10th Cir. 1975); *Barnes* v. *Andrews, supra; Platt Corp.* v. *Platt,* 42 Misc. 2d 640 (1964), *rev'd on other grounds,* 17 N.Y.2d 234 (1966).

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* Vogel and Klein were key officials in two of the major trading companies on the Produce Exchange (indeed, the companies which had the most extensive dealings with Allied). Both were members of the Exchange's Board of Managers and Executive Committee. Vogel was also Vice President of the Exchange. Richard Forti, a Bunge Vice President who reported directly to Klein (JA 1357.1a) served on the Exchange's Cottonseed Products Committee (Pl. Ex. 188).

As previously detailed (*supra*, pp. 12-27; *see* App. Br. pp. 16-28), the warning signs of a market disorder were notorious during 1963. Defendants cannot shield themselves from liability by pleading that they were in the "grain trade" or were company executives who did no trading. They accepted the duty of market regulators, and this carried with it the duty to keep themselves informed as to market conditions. As Judge Mansfield stated in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 398 (2d Cir. 1973), *cert. denied*, 414 U.S. 910 (1973) (concurring in part and dissenting in part):

> [T]op corporate officers [cannot] escape liability by pleading ignorance where it can be shown that red flags putting them on notice or providing warning signals of either undisclosed or misrepresented facts of a material nature were readily apparent to all and that a routine check would have disclosed the misrepresentation.

Defendants' futile pleas of ignorance are insufficient in both fact and law.

POINT III

THE TRIAL COURT'S EVIDENTIARY RULINGS DEPRIVED THE TRUSTEE OF HIS RIGHT TO A FAIR TRIAL.

Defendants glibly assent that the Trustee should not now complain about evidentiary rulings as the Trial Court afforded him "substantial leeway" in presenting his case (Joint Br., p. 77). This is exactly the opposite of what occurred below—the erroneous rulings made by the Trial Court were so substantial and prejudicial that they deprived the Trustee of a fair trial (App. Br., pp. 52-83).

A. *Exhibit 1-A*

The Trustee's main brief demonstrates the overwhelming prejudice created by the Trial Court's improper admission

of Def. Ex. 1-A (App. Br., pp. 67-83). Defendants offered Exhibit 1-A for the purpose of reading to the jury the opinions and conclusions contained therein (App. Br., pp. 70-71). Whether "most of the report is fact, not opinion" (Joint Br., p. 87) is therefore utterly irrelevant.

In arguing that such opinions and conclusions are admissible, defendants misapprehend the applicable law. Thus, defendants quote the Senate Committee report regarding the construction of Rule 803(8)(C) (Joint Br., p. 88 fn.), but fail to include the highly relevant statement by the House Judiciary Committee that:

> The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase 'factual findings' be strictly construed and that *evaluations or opinions contained in public reports shall not be admissible under this Rule.* (Emphasis supplied.) H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 14 (1973).

Moreover, the authorities relied upon by defendants (Joint Br., pp. 87-88 & fn.) suggest that, at the very most, only two types of governmental reports are admissible under Rule 803(8)(C)—reports prepared in the course of routine governmental activities and reports based upon adjudicatory procedures. Even under these tests, Exhibit 1-A should have been excluded.

First, the examples of reports cited by the Senate Committee as admissible under Rule 803(8)(C) reflect routine administrative activity by a disinterested party in accordance with the philosophy underlying the government records rule—to wit, the avoidance of inconvenience to government officials in testifying to routine matters which, by their very nature, ought not to be susceptible to challenge. S. Rep. No. 93-1217, 93d Cong. 2d Sess., p. 18 (1974). Such reports bear little resemblance to Exhibit 1-A, prepared in the wake of an unprecedented market debacle

by an agency which was criticized for its role therein, and which contained complex conclusions requiring substantial testimony by experts at trial. This report was distributed to a limited audience in a peculiar manner and then relegated to the attic (App. Br., pp. 81-82).

Second, the other type of report suggested as being admissible under Rule 803(8)(C) is one which results from an investigation where there is notice to the affected parties and an opportunity to be heard. Advisory Committee's Note, 4 WEINSTEIN, EVIDENCE p. 803-45 (1975). To the extent they bear on the admissibility of government reports, the two cases cited by defendants are concerned only with administrative findings based upon adjudicatory procedures. *See Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973) and *Chicago Mercantile Exchange* v. *Deaktor,* 414 U.S. 113 (1973). Thus, in *Ricci* the Supreme Court held that where an administrative hearing could be obtained from the Department of Agriculture, on notice to the offending party and at which hearing witnesses could be called and an order prepared based upon the record of such proceedings, 400 U.S. at 295-297 fns. 7-10, a federal court could stay further judicial action pending the outcome of such an adjudication. *See* 409 U.S. at 302, 305. To the same effect was its holding in *Deaktor.*

In the "investigation" which led to Exhibit 1-A, however, the CEA utilized none of these adjudicative procedures, although it had the power to do so.* Instead, the CEA

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* Commodity Exchange Act § 8, Act of Sept. 21, 1922, ch. 369, § 8, 42 Stat. 1003, as amended by Act of June 15, 1936, ch. 545, § 2, 49 Stat. 1491. Among other things, Section 8 authorized the Secretary of Agriculture to make "such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade" and to publish the results of such investigations. In making such investigations, the Secretary of Agriculture or his designee had the power to compel by subpoena the attendance and testimony of witnesses and the production of documentary evidence, and to invoke the aid of any court with respect thereto. Commodity Exchange Act § 6(b), Act of June 16, 1955, ch. 151, 69 Stat. 160.

chose to rely solely on secondary sources of information (some of which are not even disclosed in Exhibit 1-A), drawing conclusions, for example, about the intent of DeAngelis without ever having spoken to him (*see* App. Br., p. 81; Def. Ex. 1-A, p. 30), or on the basis of presumptions and expectations (*see* App. Br., p. 78, fn.**). Surely, neither the House, the Senate nor the Supreme Court contemplated the secretive approach utilized by the CEA in the preparation of Exhibit 1-A.

In an effort to avoid the first-hand knowledge requirement (App. Br., pp. 77-78), defendants rely on a few cases arising under 28 U.S.C. § 1732 (Joint Br., p. 85). Each of these cases arose under 28 U.S.C. § 1732(a), which stated that lack of personal knowledge by the entrant does not affect the admissibility of the record. This subsection was, however, repealed as of July 1, 1975 when the Federal Rules of Evidence became effective. Act of January 2, 1975, ch. 595, 88 Stat. 1949. Rule 803(6), which supplanted 28 U.S.C. § 1732(a), predicates admissibility upon a showing that the document was prepared "by, or from information transmitted by a person with knowledge." This defendants could not establish with respect to Exhibit 1-A. (App. Br., p. 70 fn.)

Finally, defendants' *ipse dixit* that the "trustworthiness of the document [Exhibit 1-A] is apparent from the report itself" (Joint Br., p. 90), reflects a lack of comprehension of the very issues the Trustee should have been permitted to explore at trial—*e.g.,* the motivations of the unknown author of the report, the circumstances under which it was prepared, and the sources on which the author relied. The circumstances surrounding the preparation of Exhibit 1-A create such grave suspicion that this factor alone should have barred its admission (App. Br., pp. 81-82). Indeed, Exhibit 1-A was not even produced during the discovery obtained by the Trustee from the CEA in *Freeman* v. *Selig-*

son, 405 F.2d 1326 (D.C. Cir. 1968), and instead, may well have been willfully suppressed at that time (JA 1917a-18a).

In sum, even if certain evaluative reports can be admitted under Rule 803(8)(C), Def. Ex. 1-A should not be one of them.*

B. *Exclusion of Relevant Evidence*

The Trustee has detailed the serious errors committed by the Trial Court in wrongfully excluding significant evidence relating to defendants' bad faith and other regulatory failures (App. Br., pp. 52-66). In attempting to defend such exclusionary rulings, defendants make several false assertions to which the Trustee now responds.

1. ***Harbor Tank***

Defendants Klein and Bunge contend that the Trial Court properly excluded the Trustee's evidence concerning the Harbor Tank incident (Bunge Br., pp. 9-25). Their desire to exclude the Harbor Tank evidence is understandable, since it directly and succinctly demonstrates Klein's bad faith failure to regulate in 1963. There is however no basis for its exclusion.

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* Defendants' claim that Exhibit 1-A was properly authenticated as an "official record" (Joint Br., p. 84 fn.) is without merit. It is not enough simply to show, as defendants have done, that a document was taken from its legal custodian; the proponent must first show that the document offered is in fact a "public record or report." (*See* App. Br., p. 75 fn. and the cases cited therein.) This defendants have failed to do. Indeed, as Judge Weinstein stated in the very passage cited by defendants:

> A person offering a writing or data compilation in evidence under Rule 901(b)(7) therefore has the burden of making a prima facie showing of two facts: (1) that the material offered is a public record; and (2) that the public record is from the public office where such items are kept. 5 Weinstein, Evidence ¶ 901(b)(7)[01], pp. 901-94 (1975).

Not only did defendants fail to make any effort to meet their burden of proof, but they now suggest that the Trustee "hypocritically" refused to do it for them by not previously deposing Alex Caldwell (Joint Br., p. 83).

(a) *Rule 403*

Rule 403 of the Federal Rules of Evidence permits evidence to be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, delay or needless presentation of cumulative evidence. Defendants cite several cases supporting the exclusion of evidence which is only *slightly* probative (Bunge Br., pp. 12-15). Those cases are inapposite here since the Harbor Tank incident is *highly* relevant. Harbor Tank refutes the contention of Klein and Bunge that they did not know and could not have known of Allied's manipulation (Bunge Br., pp. 4-6; Joint Br., pp. 25-27) and demonstrates that Klein and Bunge not only knew of Allied's manipulation, but aided and abetted it (App. Br., pp. 25-27, 54-55).*

Further, there is no basis for defendants' argument that the introduction of direct evidence concerning a central element of the Trustee's causes of action could result in "undue" delay (Bunge Br., pp. 15-16). The Harbor Tank evidence would have proven Klein's and Bunge's knowledge of Allied's manipulation and insolvency far more directly than the largely circumstantial evidence upon which the Trustee was forced to rely. Rather than delay the trial,

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* Klein and Bunge also assert that the evidence of Harbor Tank was cumulative (Bunge Br., p. 18). This is an interesting argument in a case where defendants are urging affirmance of a directed verdict based upon lack of evidence in the record.

Defendants also assert that Harbor Tank is not admissible to impeach Klein's credibility because "[e]xtrinsic evidence offered solely to impeach would be inadmissible under the collateral evidence rule" (Bunge Br., p. 17). Since Harbor Tank was not offered "solely" to impeach or rebut Klein, but also as part of the Trustee's case in chief—to refute defendant's claims that they lacked knowledge of Allied's manipulative activities—this assertion is specious. "When rebuttal testimony goes to the truth of what a witness has said 'in matters crucial or material to the issues on trial by no process of reason can it be held 'collateral.'" *Berry* v. *Monongahela Connecting R.R. Co.,* 397 F.2d 181, 184 (3d Cir. 1968), *quoting Ewing* v. *United States,* 135 F.2d 633, 641 (D.C. Cir. 1942), *cert. denied,* 318 U.S. 776 (1943).

the Harbor Tank evidence would have facilitated its progress.*

Nor was the Harbor Tank incident too "inflammatory" to place before the jury (Bunge Br., p. 16). Where, as here, the proffered evidence goes to the heart of a case, the courts view such cries with a most jaundiced eye. *United States* v. *Flynn,* 216 F.2d 354, 365 (2d Cir. 1954), *cert. denied,* 348 U.S. 909 (1955): "While the episode to be sure was an unsavory one there is no blinking the fact that this was one of the prime reasons for its relevance on the issues to which it was directed." *Accord, Travis* v. *United States,* 269 F.2d 928, 939 (10th Cir. 1959), *rev'd on other grounds,* 364 U.S. 631 (1961). The short answer to the claim that the jury would have been confused by this simple episode (Bunge Br., pp. 15-16) is that this is an area "where a jury's common sense" can best be utilized. *Cf. Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 297 F.2d 906, 912 (2d Cir. 1962), *cert. denied,* 369 U.S. 865 (1962).**

(b) *Res Judicata*

Defendants Bunge and Klein accuse the Trustee of attempting in this suit to relitigate the same claims that

* As a practical matter, introduction of the Harbor Tank evidence would not have required additional witnesses, since the participants either testified at trial (DeAngelis, Klein and Fornari) or had their depositions read to the jury (Forti, Groeneveld and Kenner).

** As Judge Weinstein notes:

> Since the trial judge is granted such a powerful tool by Rule 403, he must take special care to use it sparingly. The trier must rely primarily on the lawyer for decisions on what evidence will be useful. Except in rare situations, the good sense of lawyers and jurors and the tactical dangers of overreaching provide sufficient assurance that offered relevant evidence will be helpful. If there is doubt about the existence of unfair prejudice, confusion of issues, misleading, undue delay, or waste of time, it is generally better practice to admit the evidence taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge. 1 Weinstein, Evidence ¶ 403 [01], p. 403-7 (1975).

were asserted in the Harbor Tank action filed in the Supreme Court of New Jersey (Bunge Br., pp. 19-25).* In New Jersey, the Trustee sued in common law tort to recover damages incurred by Haupt when the warehouse receipts issued by Harbor Tank proved fraudulent. The measure of damages sought was the value of the fraudulent warehouse receipts. In contrast, this case has been brought under entirely different causes of action, arising out of federal statutes, to recover entirely different damages sustained at a different time and in a different manner. *See* JA 2171a (Opinion of Whipple, J., in *Seligson* v. *Bunge Corp*,. remanding the suit to New Jersey state court for failure to state a federal claim). While both suits involve Klein's and Bunge's knowledge of Allied's activities, the respective causes of action asserted in each suit are predicated upon separate and distinct elements and could not have been raised in the other suit. Hence, defendants' *res judicata* arguments are totally without merit.**

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* *Seligson* v. *Bunge Corp.*, No. L-41821-67 (Sup. Ct. Essex Co. N.J.).

Neither by way of an amended answer nor in the pre-trial order in the instant case did defendants Bunge and Klein allege *res judicata*, collateral estoppel or release as a defense. Indeed, not until the trial herein had commenced—some *twenty months* after the release and dismissal of the New Jersey action—were these defenses sprung upon the Trustee. If, as defendants claim, the Trustee herein is attempting to relitigate the same claims that were litigated in New Jersey, then Klein and Bunge should have long ago interposed the defenses of *res judicata* and release. Not having done so, they have waived these defenses. *Badway* v. *United States*, 367 F.2d 22, 25 (1st Cir. 1966); *Gonzalez* v. *Fireman's Fund Ins. Co.*, 385 F. Supp. 140, 145 (D.P.R. 1974); *Federal Savings & Loan Ins. Co.* v. *Szarabajka*, 330 F. Supp. 1202, 1205 (N.D. Ill. 1971); *Garrison* v. *Baltimore & Ohio R.R. Co.*, 20 F.R.D. 190, 194-95 (W.D. Pa. 1957); Federal Rules of Civil Procedure, Rules 8(c), 12(b).

** Under New Jersey law, *res judicata* principles do not preclude a second suit on a different cause of action even where, unlike the instant case, both suits arise out of the same factual situation. *See, e.g., Longo* v. *Reilly*, 35 N.J. 405, 114 A. 2d 302 (1955), *cert. denied,* 25 N.J. 45, 134 A.2d 540 (1957).

In their brief (pp. 24-25), defendants Klein and Bunge raise the spectre of multiple trials, apparently accusing the Trustee of sharp

(i) *The Voluntary Dismissal*

The voluntary dismissal of the Harbor Tank suit operates as *res judicata* only as to the causes of action actually asserted in that suit, and does not bar the separate and distinct causes of action involved in this suit. *Herendeen* v. *Champion Int. Corp.*, 525 F.2d 130, 133 (2d Cir. 1975); *American Heritage Life Ins. Co.* v. *Heritage Life Ins. Co.*, 494 F.2d 3 (5th Cir. 1974); *Phillips* v. *Phillips*, 119 N.J.E. 497, 178 A. 265 (E&A 1935); *Bober* v. *McDonnell & Co.*, 36 App. Div. 2d 940 (1st Dep't 1971). Nor does the dismissal of the Harbor Tank suit have any collateral estoppel effect as to any of the *facts* related thereto since there was no judicial determination of such facts. *United States* v. *International Bldg. Co.*, 345 U.S. 502 (1953); *American Heritage Life Ins. Co.* v. *Heritage Life Ins. Co.*, *supra* at 8-9; *Phillips* v. *Phillips*, *supra.**

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practice in bringing two suits (Bunge Br., pp. 24-25). The Trustee acted in complete good faith in bringing two actions: Obviously, the Trustee's antitrust claim had to be brought in a Federal court. *Blumenstock Bros. Adv. Agency* v. *Curtis Pub. Co.*, 252 U.S. 436, 440 (1920). And, at the time that the Trustee was preparing the instant suit, the Federal court which would hear the antitrust claim did not have jurisdiction over the Harbor Tank causes of action which alleged substantially disparate facts. *See Kleinman* v. *Betty Dain Creations*, 189 F.2d 546, 548-49 (2d Cir. 1951).

Klein and Bunge do not seriously attempt to distinguish *Household Goods Carriers' Bureau* v. *Terrell*, 417 F.2d 47 (5th Cir. 1969), cited by the Trustee to show that no *res judicata* defense exists with respect to the Harbor Tank evidence (App. Br., p. 56). Defendants' discussion of *Terrell* is concerned only with the issue of prejudice. And the question of prejudice which arose in *Terrell*—the possibility that the jury improperly awarded damages for libel—could not arise in the instant case, as the question of damages was not presented to the jury in the bifurcated trial below. Since defendants do not attempt to distinguish *Terrell* with respect to the issue of *res judicata*, they apparently concede that *Terrell* is controlling on the issue for which it was cited by the Trustee.

* The cases cited by Klein and Bunge (Bunge Br., p. 22) are readily distinguishable on their facts. Both *Koblitz* v. *Baltimore & Ohio R.R. Co.*, 164 F. Supp. 367 (S.D.N.Y. 1958), *aff'd*, 266 F.2d 320 (2d Cir. 1959), *cert. denied*, 361 U.S. 830 (1959), and *Mars* v. *McDougal*, 40 F.2d 247 (10th Cir. 1930), *cert. denied*, 282 U.S. 850 (1930), involved a subsequent suit in which plaintiffs asserted the

(ii) *The Release*

Defendants Klein and Bunge also assert that the release given by the Trustee in the Harbor Tank suit bars the introduction herein of any evidence relating to the Harbor Tank incident (Bunge Br., pp. 19-20). Such an interpretation tortures the plain language of the release.

Manifestly, a party giving a release may limit it to specific claims. *Eagle Lion Films* v. *Loew's, Inc.,* 219 F.2d 196 (2d Cir. 1955); *Cordaro* v. *Lusardi,* 354 F. Supp. 1147 (S.D.N.Y. 1973); *Van Slyke* v. *Van Slyke,* 80 N.J.L. 382, 78 A. 179 (1910); *Bober* v. *McDonnell & Co.,* 36 App. Div. 2d 940 (1st Dep't 1971). It is the intent of the parties which controls, and in the instant case there can be no doubt as to that intent.

The Harbor Tank release states that Bunge and Klein are released only "from any and all *claims asserted* by [the Trustee] in the Harbor Tank action" (JA 2936a-37a; emphasis supplied), and does not address the underlying *facts.* Since the claims made in the Harbor Tank action are entirely separate and distinct from those asserted in the instant action, the release does not bar use of the Harbor Tank facts herein.

In *Bober* v. *McDonnell & Co., supra,* the defendant stockbroker allegedly overcharged and then failed to deliver stock sold to plaintiff. Plaintiff sued defendant for the failure to deliver. When that suit was discontinued with

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same cause of action which they had asserted in a prior suit. In the instant case, a *different* cause of action is being asserted. *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322 (1955), and *Commissioner* v. *Sunnen,* 333 U.S. 591 (1948), while directly on point, support the Trustee's position, not that of the defendants. Both involved a subsequent suit on a different cause of action, and in both cases the Supreme Court held that *res judicata* did not apply.

In the sole case which defendants cite as espousing New Jersey law on the subject (Bunge Br., p. 22), the settlement and payment by the defendant therein was held to constitute an admission of her wrongdoing. *Kelleher* v. *Lozzi,* 7 N.J. 17, 80 A.2d 196 (1951), cited at Bunge Br., p. 26. Under defendants' version of controlling New Jersey law, if estoppel applies in the instant case at all, it applies only to bar Klein and Bunge from disputing the truth of the Trustee's Harbor Tank allegations.

prejudice, plaintiff signed a release "limited to any and all claims alleged" in that action. When plaintiff later brought suit based on the claim of overcharge, defendant moved to dismiss on grounds of *res judicata* and release. The motion was denied, the court holding that by the language of the release "there was no transactional release only a pleaded cause of action release." *Id. See also Fox* v. *Kane-Miller Corp.*, 398 F. Supp. 609 (D. Md. 1975):

> A party well represented by counsel who signs a carefully worded document offering him a narrow and specific release will not be heard, in the absence of any effort on his part to rescind the document, to say that it was his belief that it was in fact a general release. *Id.* at 624.

2. ***Robert Raclin***

In support of the Trial Court's improper exclusion of the expert testimony of Robert Raclin, defendants argue that Raclin was not an expert and that he was not qualified to testify because he was unfamiliar with minor details of the Produce Exchange's operations (Joint Br., p. 79). This argument is frivolous. Raclin was a director of the Chicago Board of Trade and was familiar with vegetable oil trading throughout 1963. As already detailed (App. Br., pp. 60-63) Raclin's experience in commodities trading and regulation constitutes more than sufficient qualification—he is an expert.* The fact that exchanges are not identical is unimportant; as Raclin noted, their differences are minor (JA 1929a). Furthermore, all designated contract markets

* The fact that Raclin never traded on the Produce Exchange is not significant, despite defendants' assertion to the contrary (Joint Br., p. 79). Professor Arthur also never traded on the Produce Exchange (*See, e.g.*, JA 1832.1a), yet defendants do not doubt his qualifications—indeed, they proffered him as an expert witness and the Trial Court accepted him as such.

Similarly, that Raclin could not state which particular warehouses were licensed by the Produce Exchange (JA 1941a-42a) is of no moment. Whether particular warehouses were or were not licensed is not at issue in this case. Raclin was unquestionably familiar with the role of a licensed warehouse on the Produce Exchange; nothing further was necessary in this respect for his testimony at trial.

operate under the same statute and are charged with the same duty to maintain an orderly market free from price manipulations and squeezes. 7 U.S.C. § 7(d); Tr. 340-41, 531, JA 1942a. Certainly the manner in which directors of one commodity exchange perform their statutory duties is probative of the standard of care required by other commodity exchange directors in performance of the same duties. *See generally Continental Bank & Trust Co.* v. *Brandon*, 297 F.2d 928 (2d Cir. 1962).

In their briefs, defendants dramatize the importance of Raclin's testimony by arguing that Professor Gray is the only witness whose testimony supports the Trustee's position on certain critical issues (*e.g.*, Joint Br., p. 31; Bunge Br., p. 30). As the Trustee's offer of proof made clear, Raclin would have confirmed Prof. Gray's testimony that the ex-pits were improper (JA 1945a, 1951a, 1953a); and he would have supplied the alleged missing price analysis (Joint Br., pp. 28 fn., 31; Bunge Br., p. 30 fn.) by testifying that Allied's activities caused a dislocation of oil during 1963, affecting prices and spreads in both the cash and futures markets (Ct. Ex. 5). Since Raclin was active in and kept abreast of the vegetable oil markets in 1963 (JA 1932a-33a), his testimony that it was then apparent that Allied's activities threatened orderly marketing conditions (JA 1943a-53a; Ct. Ex. 5) could not be criticized by defendants as based upon "after-the-fact" analysis (Joint Br., p. 32).

Raclin was the Trustee's only trade expert. Indeed, he was the Trustee's only non-hostile witness who had been both a trader and a regulator. The importance of Raclin's testimony cannot be discounted. It would have been probative of the main points in the Trustee's case, while at the same time impeaching the defendants' testimony. Moreover, Raclin's testimony may well have been crucial to establish the credibility of the Trustee's case with the jury by showing that a member of the trade, a regulator himself, recognized that the Board of Managers had the duty and ability to

perceive and prevent price manipulations and market disorders, that ample warnings signs reflected Allied's threat to orderly marketing conditions, and that the Board failed to take effective steps to cure the problem (JA 1949a-50a; Ct. Ex. 5).

By excluding Raclin's testimony, the Trial Court abused its discretion and committed reversible error.

CONCLUSION

The Trustee was prevented from having his complete case considered by the jury as a result of unfounded direction of verdicts, erroneous evidentiary rulings and improper instructions given to the jury by the District Court. Individually, each of the Trial Court's errors severely prejudiced the Trustee's case; taken together they destroyed it.

As a result of the foregoing, the Trustee is entitled to a new trial, and the judgment below should be reversed in all respects.

Dated: New York, New York
July 23, 1976

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Attorneys for the Plaintiff-Appellant, Harvey R. Miller, as Trustee in Bankruptcy of Ira Haupt & Co.
Office & P. O. Address
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New York, N. Y. 10022

IRA M. MILLSTEIN
CARL D. LOBELL
JOEL B. HARRIS
LAWRENCE D. BERNFELD
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,

Plaintiff,

-against-

NEW YORK PRODUCE EXCHANGE, et al.,

Defendants.

-----------------------------------x

AFFIDAVIT OF SERVICE

Docket No. 75 - 5024

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Harold Bonacquist being duly sworn, deposes and says that he is over the age of eighteen; that he is employed by Weil, Gotshal & Manges, the attorneys for Plaintiff in the above-entitled action; that on the 9th day of August, 1976, he served the Reply Brief on each of the persons hereinafter mentioned by depositing two true copies thereof securely enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States Government in the City and State of New York, directed to the persons hereinafter named at their respective office and post office addresses within the State designated by them for that purpose:

OLWINE, CONNELLY, CHASE
O'DONNELL & WEYHER, Esqs.
Attorneys for Defendants-Appellees New York Produce Exchange, Donald V. MacDonald, Sidney Fashena and I. Usiskin & Co.
299 Park Avenue
New York, New York 10017

BROWN, WOOD, IVEY, MITCHELL
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Attorneys for Defendants-Appellees Merrill Lynch, Pierce, Fenner & Smith, Incorporated and Harry B. Anderson
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PAUL, WEISS, RIFKIND, WHARTON & GARRISON, Esqs.
Attorneys for Defendants-Appellees Continental Grain Company and Harold H. Vogel
345 Park Avenue
New York, New York 10022

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, Esqs.
Attorneys for Defendants-Appellees Bunge Corporation and Walter C. Klein
140 Broadway
New York, New York 10005

Harold Bonacquist

Harold Bonacquist

Sworn to before me this
9th day of August, 1976

R F Brodegaard

Notary Public

ROBERT F. BRODEGAARD
Notary Public, State of New York
No. 31-4626680
Qualified in New York County
Commission Expires March 30, 1978

Index No. *Year 19*

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AFFIDAVIT OF SERVICE

WEIL, GOTSHAL & MANGES

Attorneys for Plaintiff

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022
(212) 758-7800

To:

Service of a copy of the within *is hereby admitted.*

Dated:

....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY — *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT — *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

WEIL, GOTSHAL & MANGES

Attorneys for

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022

To:

ONLY COPY AVAILABLE

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on , 19

(Print signer's name below signature)